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The Debate over Reproductive Rights in Germany and Slovakia: Religious and Secular Voices, a Blurred Political Spectrum and Many Inconsistencies[1]

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Abstract: *In this paper we analyse the legislation and arguments concerning bioethics and reproductive rights (on the examples of abortion and pre-implantation genetic diagnosis – PGD), as well as the power of different actors' voices in Slovakia and Germany. Our comparative analysis revealed a paradox: In the abortion case study we found a restrictive principle with a pragmatic/liberal application in Germany, and a liberal law with a restrictive application in Slovakia. In the PGD case study we found a liberal approach and dominating critical religious voices in Slovakia; and a restrictive approach and dominating critical secular voices in Germany.*

Keywords: ***reproductive rights, abortion, pre-implantation genetic diagnosis, religion, bioethics***

1. Introduction – Different Bioethical "Hot" Topics in Different EU States

In this paper we would like to analyse the debate over and legislative situation surrounding bioethics and reproductive rights issues (on the examples of abortion and pre-implantation genetic diagnosis) as well as the power of different actors' voices in this debate in Slovakia and Germany.

Abortion could be considered a settled political issue in many European countries, with the well-known exceptions of Portugal, Ireland and Poland, which still allow the act only under highly restrictive conditions. The debate seems to lie behind us – having started in the 1970s with clear legislative outcomes today. Nonetheless, a consensus on abortion should not be taken for granted. As we will see, the situation in Germany in the 1990s and in Slovakia nowadays shows that the debate could be reopened at any moment should the balance of power among the leading voices change.

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The European socialist countries have had liberal laws on abortion. After the fall of communist regimes, the transitional period meant also a redefining of these laws and practices, as can be shown in our two case studies of Slovakia and Germany.

Slovakia had a very liberal law on abortion during the socialist area and still does, but its validity has been strongly attacked, especially by a political party promoting the Christian ethos. The importance of conservative forces in the political arena has led to a decline in support for legal abortion during the 1990s and early 2000s, and renders the practical implementation of the law difficult.

Germany experienced a revival of the debate after reunification, when, in fact, an adoption of the overall political and legislative system of the Western part by the Eastern part took place – with the exception of the abortion law. East Germany clearly stated in the Unification Treaty that the West German law on abortion, which was more restrictive, could not be simply adopted as is, and that instead a new law should be debated and a solution found by the end of 1992 at the latest (Czarnowski 1994). Therefore, at the beginning of the 1990s, paragraph 218 of the German penal code (*StGB*) on the termination of pregnancy was reformed. The current formulation in the German law and in judgements by the German Constitutional Court is that abortion is in principle illegal with some exceptions under certain conditions stipulated by the law.

Other bioethics issues play an important role in current debates in Germany, which are far less important in Slovakia, e.g. pre-implantation genetic diagnosis (PGD, for details see part 3) or embryo research. The interests and values voiced in the Slovak and German bioethical debates are of course formulated by many different actors, but interestingly, the opposition against the extended use of newly-available biotechnologies is shaped mostly by secular voices in Germany, while in Slovakia it is mainly the Catholic Church itself and a conservative party promoting the Christian ethos.

2. The Case of Abortion: a Never-Settled Battle?

2.1 Germany: the Paradox of a Restrictive Principle and a Pragmatic Solution

As previously mentioned, the legislation concerning abortion in Germany in force today was adopted in the 1990s following reunification, because East Germany and West Germany had different systems regarding abortion. The Eastern more liberal[2],

[2] In Europe's formerly communist countries (perhaps with the exception of Romania) a higher degree of enforced emancipation of women in terms of their education and employment required some reproductive autonomy and a liberal abortion law.

so-called *term-model*[3] (*Fristenregelung),* had to be made compatible with the Western more restrictive *indication model*[4] (*Indikationsregelung*), dating back to the mid 1970s. Thus, in 1992, paragraph 218 of the German Penal Code (*StGB*) on the termination of pregnancy was highly debated and finally reformed in a way that coupled the term-model with the obligation of prior counselling (*Beratungspflicht*).

The German Constitutional Court (*Verfassungsgericht*) ruled a year later in accordance with its former judgment from 1975 that the Constitution protected the foetus from the moment of conception, but recognized that it is within the discretion of Parliament *not to punish abortion* in the first trimester, provided that the woman had submitted to state-regulated counselling designed to discourage termination and protect unborn life.[5] The Constitutional Court ruled that human dignity applies to the unborn human life and therefore the Constitution obliges the state to protect the life even of the unborn child. It further asserts: that the unborn child should have legal protection even against its mother; that abortion is wrong in principle during the whole duration of the pregnancy and is, therefore, legally prohibited; that abortion, which is the killing of an unborn child, is not a fundamental right of women; and that the basic legal position of women, however, permits in exceptional situations, that they shall not be condemned and the legislature is to establish such exceptions in detail.[6] The Parliament passed a new law, the Conflictual Pregnancy Act (*Schwangerschaftskonfliktgesetz*) of 1995, which organized the counselling and established that a woman has to go through counselling and receive authorisation before she can have an abortion. The performance of an abortion remains illegal in principle (Article 218 *StGB*) except under certain conditions (Article 218a *StGB*) when it is performed within the first 12 weeks of pregnancy and the woman receives counselling from her doctor and from an external counselling centre.

The German Catholic Church takes part in this process of counselling and authorisation, which is surprising enough to be mentioned here. Indeed, this cooperative attitude contrasts with the Vatican's position on abortion and also with the position of the Slovak Catholic Church. As a matter of consistency with the Catholic faith, the Vatican did advise the German Catholic Church to refrain from participating in the counselling of women before abortion and in the authorisation; and to apply instead the principle of conscientious objection. The German Catholic bishops decided to ignore the Vatican's admonition and continued with the counselling.

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3 The term-model allows an abortion during the first trimester based on the woman's decision.
4 The indication model balances the right of the foetus to live with the objective difficulties of the mother, whose difficulties should be explicitly reasoned.
5 BverfGE 88, 203.
6 http://www.servat.unibe.ch/law/dfr/bv088203.html.

Concerning the right to conscientious objection of physicians, since 1974 the law on abortion has recognised that no one is under obligation to take part in an abortion,[7] but this does not apply if the woman is in a life-threatening situation or would likely suffer serious damage to her health.[8] In 1991, the German Federal Administrative Court (*Bundesverwaltungsgericht*) recognised that a job advertisement, published by a municipal hospital, requiring only a physician willing to perform abortions was not a violation of the law stating that no one was under the obligation to perform abortions. Here the court clearly balanced the right to conscientious objection with the need to provide abortions in public hospitals.[9]

It should also be mentioned that legal abortion expenses are covered by statutory health care insurance schemes only if the monthly income of the woman seeking abortion does not exceed a certain limit, if she is under 18, or if the pregnancy is the result of a rape,[10] which does not make it a normal reimbursable medical procedure for everyone.

To sum up, in Germany the Constitution protects life since conception according to Article 1 on Human dignity and Article 2§2 on the right to live that is granted to everyone including the unborn child, according to the Constitutional Court. The Constitutional Court also made it clear that abortion is not a fundamental right of women, but their basic legal position permits abortion in exceptional situations without punishment. Therefore, if the legislature is willing to restrict the possibilities for abortion, there is then no constitutionally secured right to prevent such restriction. On the contrary, anti-abortion forces can rely on favourable constitutional jurisprudence. The Constitutional Court and the law take a principled approach (protection of life from conception on), but in practice are allowing a more flexible solution (abortion is an available option in Germany).

Such a divide between a highly-principled position and a pragmatic softening of the ethical principle is also to be found in the law on embryo research. The law clearly forbids German researchers from producing embryos for research, but nonetheless allows the import of embryos from abroad for the same purpose, "exporting" in this way its ethical concerns. On the one hand, Germany offers in its Constitution and legislation the image of a state with an irreproachable moral position, and on the other hand, it is using more liberal laws abroad to overcome the handicaps created by this strict moral stance.

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7 §12.1 *Schwangerschaftskonfliktgesetz* SchKG (Conflictual Pregnancy Act).
8 §12.2 *Schwangerschaftskonfliktgesetz* SchKG (Conflictual Pregnancy Act).
9 12.13.1991, BverwGE 260,70.
10 *Gesetz zur Hilfe für Frauen bei Schwangerschaftsabbrüchen in besonderen Fällen* SFHG (Abortion Help in Special Cases for Women Act – http://www.ak-lebensrecht.de/info/gesetz_sfhg.html).

2.2 Slovakia: the Paradox of a Liberal Law and its Restrictive Application

Slovakia has a rather liberal law on abortions which allows them before the 12th week of pregnancy and medically indicated[11] abortions for even longer (Act No. 73/1986 Coll.). In practice though, obtaining an abortion is rendered difficult, first, because it is not covered by health care insurance and for poorer women can be too expensive, and second, because in some parts of the country it is difficult to find a hospital that actually performs abortions. The reason for this is the (often collectively used) physicians' right to conscientious objection (for further details, see Pietruchová, 2005 and Kliment, 2000/2001). The state has not balanced this right with procedures securing the right of women to get a legal abortion in any conveniently located state hospital. Adding to this difficult implementation, repetitive attacks by conservative forces against the law on abortion are rendering the climate around abortions more uncertain.

The political controversy about abortions started as early as 2001, when a group of conservative members of Parliament from the Christian Democratic Movement (KDH) filed a petition with the Constitutional Court asking it to declare the Abortion Law unconstitutional. According to their view, it is unconstitutional because legalized abortion violates Article 15, Section 1 of the Constitution stating "Everyone has the right to life. Human life is worthy of protection prior to birth".

In such an uncertain context, the political forces defending abortion decided to try to secure abortion more solidly in the legislation. Until then, a simple ordinance by the Ministry of Health allowed medically indicated abortions (especially in the case of genetic damage in the foetus) until the 24th week of pregnancy. In 2003, an amendment was proposed to include the 24th week limit concerning the genetic damage directly into the law. Because of the general situation where Christian politicians and members of Parliament were repeatedly expressing their wish to achieve an abortion ban, the amendment functioned as an endorsement of the idea of legal abortions. The law was passed in the Parliament in the third reading, but then the President returned it to Parliament for further deliberation, where this time it required two-thirds of the votes to pass. Until the end of the electoral period

[11] Some authors distinguish **elective abortions** (a decision without medical indications) **and therapeutic abortions** (when the pregnancy is endangering the life or health of the prospective mother, or when the foetus is damaged and would be born ill or malformed). Other authors (e.g. Rogers, Ballantyne, Draper, 2007) understand the term '**therapeutic abortion'** more narrowly, asserting that it is meant only in the case when the woman is in danger. They distinguish it from a **selective abortion**, which is a decision, either without any medical reasons or because of medical knowledge about the foetus' illness or malformation. To overcome this conceptual chaos we are using in this text the terms '**medically indicated abortion'** (the woman is in danger or the foetus is ill) and '**elective abortion'** (a free decision based on various possible reasons).

the returned law was (deliberately) not submitted for a new vote and, according to Act No. 350/1996 Coll. on the Parliament, it wasn't possible to submit the law again during the new electoral period.

In December 2007, a judgment on the constitutionality of the abortion law was finally delivered (PL. ÚS 12/01). The Constitutional Court did not find the act in question to be unconstitutional. In justification of its decision it rejected the interpretation of the Article 15 that the right to life should be applied also to embryos, because the phrase *prior to birth* should not be understood as *the moment of conception*. Secondly, the expression *human life is worthy of protection* should not mean that human embryos are entitled to human rights. Such an interpretation would be inconsistent with women's fundamental human rights, dignity and well-being as declared in the Slovak Constitution as well as in the international declarations and conventions ratified by the Slovak Republic (e.g. Universal Declaration of Human Rights, European Convention on Human Rights, Convention on the Rights of the Child, etc.), and also with the jurisprudence of the European human rights system. The Universal Declaration of Human Rights explicitly proclaims that all human beings are *born* free and equal in dignity and rights. It means that human rights are entitled only to human beings already born, more specifically to those endowed with reason and conscience. Furthermore, the Court explained that the claim of being *worthy of protection* is sufficiently reflected in the protection of the life of the foetus in the first 12 weeks through the care for pregnant women based in other laws, e.g. the Labour Act, etc.

The Constitutional Court also decided that the mentioned ordinance of the Ministry of Health is formally not in accordance with the legislative system of the Slovak Republic, considering that all important societal issues must be addressed by laws and not by other kinds of regulations. With this decision, the Court is not questioning the justification of abortions for genetic reasons, as this is also a subject of a European majority consensus.

3. New Biotechnologies: a Renewed Debate on Reproductive Rights? Example of Pre-Implantation Genetic Diagnosis (PGD)

In current debates in Germany bioethics plays an important role. This is not really true for Slovakia where the discourse is reduced primarily to a political battle between a political party striving to impose the Catholic ethos on the whole population (through changes in legislation), and those who are oriented rather toward a liberal ethos of reproductive freedom. Voices from the nongovernmental sector are polarized between the pro-choice and the pro-life alternative as well.

Concerning our example of pre-implantation genetic diagnosis (PGD), it is an analysis of genetic characteristics of the embryos, performed after in-vitro

fertilization and before the transfer of the embryo(s) to the uterus of the woman. The decision of whether or not to implant the specific embryos is then made based on the result. In a restrictive approach to PGD, such as debated in Germany and (moderately) in Slovakia, only in the case of severe genetic diseases should the implantation not take place. A broader approach to PGD would be a more liberal acceptance of the conditions under which an embryo is rejected.

In general, it is important to note that in Germany, PGD is not legal and in Slovakia, it is not regulated, in other words it is not prohibited and therefore PGD is practiced. Nonetheless, in Slovakia it is not part of the *Catalogue of health care services* (which is a supplement to the law on health care) and for that reason is performed only in private clinics for a fee paid by the patient. A recent Slovak attempt at legally regulating the practice of PGD failed because of powerful Catholic lobbying. This resulted in a situation which is paradoxical from an anti-PGD point of view where there is no control at all rather than a lot of control over a legalized but regulated practice.

3.1 Slovakia: the Powerful Catholic Church Dominates the Debate

In Slovakia, the legal status of PGD is not clear. Although couples have had recourse to PGD for a couple of years,[12] it is not included in the *Catalogue of health care services* and therefore reimbursement of such procedures is impossible (see government decrees No. 776/2004 Coll. and 223/2005 Coll.). Thus, PGD is performed for a fee.[13] It is an example of a non-decision by which the government breaches one of its basic requirements – to treat all patients equally.

Also in 2005, an amendment of the Penal Code (300/2005) came into force introducing sanctions for unauthorized experimentation done without a justifiable health reason and without the consent of the concerned person. Moreover, testing of any therapeutic method without health reason is prohibited with regard to a) pregnant women, b) minors and people with limited legal capacity c) human foetuses and embryos, d) persons serving a prison sentence and e) soldiers on regular duty and persons on civil duty and foreigners. According to these specifications, a pregnant woman cannot approve of genetic testing of the embryo, because the life of an embryo is taken as an autonomous legal entity and as such protected by the authority of the state. This idea is explicitly expressed in c).

The unclear status of PGD was to be addressed in the Act Regulating the Use of Biology and Medicine in Healthcare, but in 2006 it was withdrawn from

[12] There are several institutions that assist reproduction; however, only one, the private clinic ISCARE, established in 2000 in Bratislava, offers PGD of embryos.

[13] Similarly, male infertility and the genetic examination of sperm are not covered. In reality, PGD is therefore accessible only to a minority of wealthy couples.

the government committee hearing because of objections by the (above-mentioned) Christian Democratic Movement (KDH).

According to KDH, withdrawing the act was the only way to safeguard religious values. In notable accordance with the *Evangelium vitae* and *Humanae vitae* by Pope John Paul II., KDH attacks every initiative concerning birth control and the reproductive rights of women. Like the Vatican and like the German Catholic Church (see below), KDH asserts that an embryo is a human being from the moment of conception and must, therefore, be respected and protected as all other human beings. It follows that, because of the surplus embryos that are frozen or discarded, in-vitro fertilization is unethical. Similarly, PGD is morally unacceptable, and considered a form of eugenics.[14]

However, evincing a different approach to the matter, the relevant definition in the act that was withdrawn in 2006 characterizes genetic examination of embryos before implantation as a diagnostic method. PGD is justified as enabling couples at high risk of conceiving a seriously ill foetus (potentially requiring termination following prenatal diagnosis) to avoid doing so. As such, it is a method of prenatal diagnosis. The withdrawn act would have regulated medical practice concerning embryos conceived in vitro and in vivo in the same way[15] and defined the permissible limits of PGD. According to the proposal, PGD could not be used in a way which would endanger the health of the embryo or foetus, nor could it be used to determine the sex, except in the case of serious, sex-linked diseases.[16] In summary, the withdrawn act precisely defined when PGD may and may not be used, and gave infertile couples or couples genetically predisposed to having seriously ill children recourse to the technique. The only danger created by the legislative loophole that characterises PGD in Slovakia is that private clinics, in their drive for profit, would recommend PGD when it is not necessary.

It should also be noted that the EU Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (the "Oviedo Protocol"), which was ratified by the Slovak Republic in 1999, does not prohibit any methods of detecting a recessive disease gene or predisposition to an illness. It does not even prohibit screening for genetic diseases. The only limit is that such screenings can only be done for health or related

[14] This argumentation is in a total contrast with the German movement for banning PGD which focused on bioethical issues and the concerns that the profit motive of international companies would drive out consideration of risks, or the danger of misuse.

[15] Further, the authors of the withdrawn act drew a distinction between an "embryo" and a "human foetus". They defined an embryo as a fertilized egg (zygote), whether in vivo or in vitro. Only when the embryo is in an advanced stage of development (during which the organs necessary for its survival and autonomy after the birth develop) do they consider it a human foetus. This period begins at three months and ends with birth.

[16] "Serious disease" is defined as one which causes invalidity or premature death or is incurable.

research reasons. The medical practice in Slovakia follows the Convention. PGD is used only in the case of clinical need and with the informed consent of the woman and her partner. It is recommended to women over the age of 35 with a history of miscarriages or unsuccessful IVF cycles, and to couples at high risk of transmitting chromosome translocation or a genetic disease linked to the X or Y chromosome.

But the very legitimacy of PGD in the Slovak Republic could be threatened by a specific interpretation of the Article 15 of the Slovak Constitution. As mentioned above, Article 15, Section 1 says "Human life is worthy of protection prior to birth". If the courts were to adopt the interpretation that human life begins from the moment of conception, as does the German Constitution Court (see above) it could classify PGD as an offence, because of the destruction of presumably defective embryos. A court's decision could determine whether under Slovak law the embryo is entitled to the same rights as a human being. There is a recent jurisprudence on Article 15, declaring that the embryo does not have human rights (see above), but the judgment was handed down in the context of abortion (and not of PGD), so there is still an element of doubt concerning what the Constitutional Court's position would be on PGD.

3.2 Germany: Secular Voices Dominate the Debate

Germany has one of the most restrictive laws in the world on the protection of the embryo. According to the Federal Embryo Protection Act (*Embryonenschutzgesetz)* of 13 December 1990, which came into force in 1991, life created by artificial fertilization must not be destroyed. Although the Federal Act does not explicitly condemn pre-implantation diagnosis,[17] its interdiction results from Article 2§1, which condemns anyone who uses a human embryo for a purpose other than that of assuring its survival.

The official ban is justified mainly on the grounds of the undesirable social consequences that legalising PGD may have rather than on the sanctity of life or other religiously inspired values. This very restricted overall approach to embryo testing in Germany reflects the great scepticism of the German public towards development of biomedical science (Rendtorff 2002) and the perceived likelihood that it could serve to promote eugenic purposes.

Contrary to this interdiction of pre-implantation diagnosis, prenatal diagnosis is legal and widely practiced in Germany. The prohibition of PGD is therefore inconsistent with the rules for medically indicated abortion (Ludwig – Diedrich – Schwinger 2001). There is no specific legal instrument covering the issue but it is a form of medical activity included in the list of interventions covered by statutory

[17] The term *pre-implantation genetic diagnosis* is not referred to in the law.

health care insurance since 1976. The "Maternity Guidelines" of the Federal Committee of Physicians and Health Care Insurance Funds, without being legally binding, still establish the conditions for prenatal diagnosis to be performed[18] – the foetus can be aborted up to the 22nd week of pregnancy if there are relevant medical reasons. An obvious inconsistency exists: on the one hand, PGD (*in vitro)* is prohibited, while on the other hand, prenatal testing (*in vivo)* and pregnancy termination for serious (mainly) genetic disorders are permitted.

In contrast to Slovakia, where the issue of PGD is not widely discussed (there are only requirements voiced by infertile couples to make it more accessible and reimbursed), in Germany PGD is debated by many. The use of PGD is attacked mainly by secular groups (some feminist and environmental groups, groups representing handicapped people, etc.) and supported mainly by professional groups of medical experts. Civic associations protesting against PGD more generally accuse human genetics of developing into new eugenics. Some of these associations are very ideological and radical, while others are more moderate. The latter ones believe that the research will develop not only new diagnostic methods but also therapeutic solutions aimed at healing. Concerns have also been raised about possible discrimination against disabled persons, who may be seen as a "preventable burden" on the social community if PGD becomes an established procedure. PGD, it is widely argued, may become a method for the selection of the fittest. Moreover some argue that a strict policy against PGD is necessary to avoid genetic consumerism, in which parents can select the desired genetic features of their children.[19]

Nonetheless, religious voices are also heard on the issue with a rather foreseeable approach. The German Catholic Church is in line with the Roman Catholic Church doctrine, which asserts that eliminating an embryo is murder and therefore condemns PGD irremediably with no possibility of compromise. In 2003, the Evangelical German Church (EKD) has also declared itself to be against the right to PGD. It argues first, that PGD is incompatible with the dignity of human life as it is based on consumption and destruction of human embryos used as materials for other purposes than its own survival; and second, that the practice of PGD

[18] In the Geman original *Richtlinien des Bundesausschusses der Ärtze und Krankenkassen über die ärztliche Betreuung während der Schwanderschaft und nach der Entbindung (»Mutterschaftsrichtlinien«),* version of 10 December 1985, most recently amended on 13 September 2007.

[19] Even if legally recognized and widely practiced, prenatal diagnosis is nonetheless still highly criticized by the groups opposing PGD. A network against Selection Through Prenatal Diagnosis, which objects to routine prenatal diagnosis, has attracted hundreds of members including midwives, doctors, representatives of churches, patients and women's associations. Several alternative genetic advisory services exist in Germany to assist patients in employing other remedies/solutions. Antenatal clinics of churches and women's associations are strong proponents of a legal claim to alternative consultations for the pregnant woman in addition to human genetics. They aim to safeguard the interests of pregnant women and to assist/help them in making independent decisions.

according to the evaluation of other countries' experiences has shown that the intention to strictly limit its application has not been respected. It also argues that PGD threatens to help assisted reproduction methods develop into a general "quality control" of human embryos. The Evangelical German Church, contrary to the Catholic Church, is therefore not only defending its position from a dogmatic perspective but is also taking into account the actual practice of PGD in countries where it is already performed to formulate its position.

These views are elaborated also in the intellectual debate. Jürgen Habermas, to cite but one prominent German intellectual with large audience in Germany, is a strong opponent of PGD in that he regards it as the harbinger of renewed eugenics. In his book on the future of human nature, Habermas (2002) expresses his fears on a new "liberal eugenics", which would (through DNA manipulation) deprive people of the characteristics of free and equal humans, because they would be born already partly determined by others in their deep self (their DNA profile). In fact, he is using the slippery slope argument (for more details see below), as his fear is that the technological evolution will soon allow future parents and doctors to change some DNA characteristics in the course of PGD. Thus, he is ahead in the debate already envisaging a next possible technological step and his critique is not so much relevant in the current stage of the debate where the question is of implanting the embryo or not, and not of improving it or not.

Conversely, the strongest advocates of PGD are professional groups, such as the Federal Medical Council (*Bundesärztekammer*), which have greater influence on the government initiative than patient groups. They would like PGD to be allowed in some exceptional cases, when justified by some medical conditions, such as monogenetic diseases or parental chromosome defects. They feel PGD should be allowed only for a specific group of patients, in cases where parents have serious and medically grounded concerns about the health of the embryo. This, as PGD advocates argue, would prevent numerous cases of abortion in later stages of pregnancy. Draft guidelines on PGD by the Federal Medical Council considers the method as admissible, if certain clearly-defined indications are present and a rigorous testing procedure has been established. Another line of argument goes with the fact that during every *in vitro* fertilisation, the embryo transfer is conditional upon a variety of factors. For example, an embryo with defects that can be visually detected will not be transferred. The logic should be that if an embryo with visually-detectable defects can be discarded so should an embryo with detected "internal" defects. In any case, only a highly restrictive implementation of PGD is thought possible in the pro-PGD German debate.

The experts are really careful in stating their position. In 2002, in the "Law and Ethics in Modern Medicine Commission" of the German Parliament on

pre-implantation genetic diagnosis, after intensive deliberation a majority of 16 commission members voted in favour of a ban on PGD.[20] However, in 2003, in the National Ethical Council "Genetic diagnosis before and during pregnancy", a majority of 15 members voted in favour of a "limited authorisation of PGD".[21]

Concerning the position of political parties, the conservative political parties – the Christian Democratic Party (CDU) and the Bavarian Conservative Party (CSU) – are against PGD, while the Green Party (Die Grünen) is mostly against, the liberal FDP is for and the Social Democrats Party (SPD) is mostly for. Concerning the publicly expressed attitudes of political leaders there are diverse positions: Helmut Kohl, the German chancellor at the time of the reopened abortion debate in 1992, was against a softened version of the law on abortion and was part of the coalition who filed a suit with the Constitutional Court; the former president (the president's position in Germany is rather moral and symbolic) Johannes Rau took a clear position against PGD and any research on embryos; and the actual president, Horst Köhler, who is himself father of a handicapped child and therefore personally concerned with this issue, has no definitive answer and when in doubt holds the protection of life as a guiding principle (*PID, PND, Forschung an Embryonen* 2004).

Finally, when it comes to the public itself, in a study on the attitudes of the Germans towards PGD, the researchers found that a majority of respondents would agree to a restricted legalization of PGD in Germany and, interestingly enough, that religion did not have the influence on the debate that was expected (Finck et al. 2006).

4. Discussion

So far, we have dealt with practices concerning PGD, the legislative limits for it, as well as arguments currently used in the deliberative debate in Slovakia and Germany. Let us now analyse the themes used in the debate in a more general context.

In analysing the debate concerning an abortion when the woman's life or health is not in danger,[22] Bredenoord et al. (2008) distinguished three different possible standpoints. The first one is represented by the understanding of the embryo as a person from the moment of conception, with full human rights and deserving full protection (with the variant that the embryo cannot be considered a person, but still deserves full protection because it has an inherent potential to become a person). Selective abortion is then unacceptable. This is the position of the Vatican.

[20] The report recommends the amendment of the German Embryo Protection Act to include PGD explicitly in the existing ban on *in vitro* fertilisation for diagnostic purposes.

[21] See Genetic diagnosis before and during pregnancy, 2003.

[22] Bredenoord (2008) uses the term selective abortion, meaning any abortion in a case when the pregnancy is not engendering the life or health of the pregnant woman (it includes economic reasons but also the case when the foetus is diagnosed with a severe handicap). For conceptual explanations, see also the footnote no. 16.

The second (gradualist) standpoint claims some independent moral status of the foetus, increasing throughout pregnancy. An abortion thus becomes more problematic as the pregnancy progresses and is considered justified only when other interests such as the health of the mother and the prevention of severe harm to the future child override the moral value of the foetus. At the same time, the value assigned to reproductive autonomy is considered important. Finally, the third standpoint claims no independent moral status for the foetus and the people adhering to it have no moral problems with selective abortion if that is the parents' decision (ibid).

An analogy can be drawn when thinking about the (in its consequences) similar case of pre-implantation genetic diagnosis (PGD). Either (1) nothing else can be done with all the in vitro created embryos than to put them into a woman's womb to make it possible for them to fulfil their inherent potential to become a human being. Then no PGD is meaningful, because no selection is allowed and the primary purpose of testing for disability is to enable parents to terminate the potentially disabled foetus (see also Stainton 2003). This is, again, the position of Vatican and of the German lawmakers.[23] Or (2) PGD is considered to be ethically acceptable, but only when carried out for good reasons, such as preventing the birth of a child with serious genetic disease. The last standpoint (3) reformulates the question of whether to allow selection following PGD and says that when the parents are (will be in the future) able to select from a range of possible children they could have, they (will) have a moral duty to select the best possible child to enable for him/her the best possible starting conditions for his/her life (Savulescu 2001). This is exactly the possible future that Jürgen Habermas (see above) and other PGD critics using the slippery slope argument are afraid of.

Not surprisingly (because it seems to be the golden mean), the public seems to support the second viewpoint. For example, an opinion poll in the U.S.A. from December 2004 (Genetics and Public Policy Center. Reproductive genetic testing: what America thinks, available at http://www.DNApolicy.org) shows that most U.S. citizens approve of using PGD to select embryos free from a fatal childhood disease (68 %) or to select with the aim of finding a good tissue match for an ill sibling (66 %). The possible concerns for the embryos are for them outweighed by the aim of avoiding the suffering of a prospective child or aiding another. But a majority (72 %) disapproves of the still hypothetical use of PGD to select embryos based on

[23] The Vatican often uses the argument that a man cannot take life, because it was God who gave it. But this is also the position of some humanitarian thinkers using more elaborated arguments, following the line that everybody has a right to live, even a handicapped child and moreover we cannot judge from outside how terrible or not his/her life is from the viewpoint of the handicapped. To oppose would require accepting the general argument that there can be instances in which an impaired life is worse than no life at all (Hudson 2006), which is in general accepted, if at all, only for a very painful life full of suffering.

genetic characteristics unrelated to health (ibid), which would fall under standpoint no. 3 in our theoretical division.

The problem is, that the distinction between a serious health problem, a mild or treatable disease, and purely a trait is often not clear (Hudson 2006). In discussing which reasons are good enough to select and discard embryos, some evoke the so-called slippery slope argument, implying that once we have allowed some PGD treatments, it is more difficult to ban others in the future. Until now, PGD seems to be used only for serious diseases and especially for severe single gene disorders, because the knowledge of human genetics is still far from perfect. However, in the near future, it may be more frequently used also to select against mild diseases (de Melo-Martin, 2004) with arguments in favour of extending PGD indications being, among others, reproductive autonomy and prevention of harm (Bredenoord et al. 2008).

The discussion on the second position on PGD introduced above, when it is ethically acceptable, but only when done for good reasons, can be further elaborated according to three different evaluation standards based on the quality of life, or the expected health status, of the resulting child. The first is the 'maximum welfare principle', which says that one should not knowingly and intentionally bring a child into the world under sub-ideal circumstances. The problem is, once again, that our ability to avoid serious genetic defects thanks to screening (possible today) can in the near future become an ability to influence other traits such as the physical fitness or colour of skin and eyes. But our opinion is, and this is a strong argument against the fears that accompany the slippery slope argument, that we cannot ban a more or less sure possibility of help for genetically impaired parents to be, based on a possible thread of misuse in the unsure future. The second principle, which is in opposition to the first, is the 'minimum threshold principle', or, more particularly, the 'wrongful life' or 'worse than death' criterion. It holds that the only reason not to bring a child into the world is when the child would have been better off not living at all (see also the footnote no. 22). This principle entails a minimal conception of the responsibility of the health care professional and leaves almost absolute space for reproductive autonomy. The third, intermediate principle is the 'reasonable welfare principle' and holds that assistance of the health care professional is justified when there is a reasonable chance of having a reasonably happy child (or acceptable life standard – ibid).

5. Conclusion – Inconsistencies in Reproductive Rights and the Diversely Important Voices of Different Actors

Concerning the protection of human life in the cases of abortion and PGD, Germany is acting inconsistently when it treats the two rather similar issues differently. There are basically two consistent options: 1) protect human life from its

very conception and forbid any use of biomedical knowledge (both for the embryos *in vivo* and *in vitro*); or 2) allow testing of embryos (both *in vivo* and *in vitro*) for genetic and other medical reasons (until the end of the first trimester) and use biomedicine as an advantageous tool for those who are asking for it (e.g. parents with hereditary problems).

In Slovakia the consistency of state interventions could not be tested because PGD is not legally recognized. However, evolving rules guiding medical practices with respect to PGD are consistent with those of prenatal diagnostic methods. The same is true about rules agreed on by the Oviedo protocol that was signed and ratified by Slovakia (but not by Germany).

As concerns accountability, the Slovak government displays a serious deficit in its responsibility towards the general public by failing to explain transparently and honestly its interventions and its inactivity (here we mean the use of the power not to decide/legislate – withdrawal of the above mentioned amendment of the Abortion Law as well as of the new act on PGD was not explained at all). Deliberation occurs frequently only within a closed circle of politicians and professionals behind closed doors, the process is not made transparent for the public and the voices of affected patients/clients and the general public are not heeded.

The Slovak government also failed to take appropriate measures to counterbalance the consequences of collective application of conscientious objection[24] to performing abortions (for more details, see Plichtová – Petrjánošová 2008). As a consequence, although they are in principle illegal in Germany, abortions are more accessible in that country than legal abortions are in Slovakia. This is especially true when taking into account the cumulative factors of poverty and living in an underdeveloped region, which make abortions barely accessible for certain groups of women.

Finally one can wonder about the proper place of religious voices in the debate. Habermas (2002) defends the idea of post-secular societies where religions are accepted as persistent communities in secular societies and religious voices are legitimate actors in the societal debate and in the decision making process. Contrastingly, secular society would be where religious positions are simply left aside and substituted by reasonable way of thinking which is considered superior.

[24] The neutral state must ensure: first, that an effective remedy should be open to challenge any refusal to provide health services (e. g. abortion); second, that an obligation be imposed on the health care practitioner exercising his or her right to religious conscientious objection to refer the woman seeking abortion to another qualified health care practitioner who will agree to perform the abortion; third, that another qualified health care practitioner will indeed be available, including in rural areas or in areas geographically remote from the centre. The exercise of the religious right must not lead to others either being deprived of access to certain services in principle available to all in the concerned state, or being treated in a discriminatory fashion. This is a principle applied in Germany but not in Slovakia.

In Slovakia the debate on bioethics as such is not a proper dialogue, but rather a political battle between one political party (with the support of the Catholic Church) striving to impose the conservative Catholic ethos on all, and those oriented rather toward a liberal opinions on reproductive freedom. Furthermore, the role of these religious actors is nor transparent nor clear, because deliberation is mixed with politics and a lot of decisions are made in a closed circle behind closed doors.

In Germany, the Christian churches are given a strong voice in consultative and deciding instances, and therefore exert influence at crucial points both at the federal level and at the level of the German States (*Länder*). Moreover, numerous members of the political elite openly present themselves (and build their reputation as) members of one of the Christian churches. On the institutional dimension the churches are given preferential treatment as their position is fixed in a constitutional law concerning religion (Art. 140 of the Constitution, and also already in the Weimar Constitution, Art. 137, sec 5, P. 2).

In theory a neutral state should organise the dialogue among different actors. But in practice, in Germany history secured a privileged position to churches and Christian values, as values promoted by the state are not self-generated but dependent on external sources, such as religion (Joppke 2007). Nonetheless, this prominent position of the Christian churches (Evangelical German Church and Catholic Church) means no hegemony over the debate and taken decisions. The Habermassian post-secular equilibrium of secular and non secular voices is in this respect not so much different from the German institutionalised corporatism inherited from history, where different societal voices are given a say.

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